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No. 97652-0

SUPREME COURT
OF THE STATE OF WASHINGTON

TODD MCLAUGHLIN, a Washington resident,

Petitioner,

v.

TRAVELERS COMMERCIAL INSURANCE COMPANY,
a foreign corporation,

Respondent.

BRIEF OF AMICUS CURIAE
CASCADE BICYCLE CLUB

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- Carlton Reid, *Bicycling Could Help Save The Planet, Says IPCC Climate Report*, Forbes (Oct. 8, 2018, 12:31 PM), <https://www.forbes.com/sites/carltonreid/2018/10/08/bicycling-could-help-save-the-planet-says-ippc-climate-report/#1e2618f2795> (last visited April 10, 2020).10
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A. INTRODUCTION

Cascade Bicycle Club (“Cascade”) asks that this Court reverse Division I’s published decision denying Personal Injury Protection (“PIP”) coverage to Todd McLaughlin who was injured in a collision with a motor vehicle while riding his bicycle. Cascade’s members routinely rely on PIP coverage to provide “no-fault” medical and wage loss benefits when they are injured, as bicyclists, in collisions with motor vehicles. The legislature wisely chose to make this coverage available to all vulnerable users of our public ways, including bicyclists, who fall victim to motor vehicle crashes. Division I’s opinion strips this key coverage from bicyclists in favor of a strict dictionary definition of the term “pedestrian,” which Travelers failed to define in its own insurance policy.

Not only is Division I’s published opinion wrong under the law, given the statutory definition of pedestrian for PIP purposes as any person “not occupying a motor vehicle,”¹ but it is also wrong in the insurance context, where average purchasers of insurance like Cascade’s members, have relied on PIP and Medpay provisions in automobile policies to cover medical bills and wage loss resulting from bicycle collisions with motor vehicles for decades. This Court should reverse.

¹ RCW 48.22.005(11).

B. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The identity and interest of Cascade in this action, as required by RAP 10.3(e), are articulated in detail in Cascade's motion for leave to submit this *amicus* brief.

C. STATEMENT OF THE CASE

Cascade adopts the statement of the case in McLaughlin's petition for review and supplemental brief to this Court.

D. ARGUMENT

In his petition for review and supplemental brief, McLaughlin shows the many legal errors Division I made in its published opinion, and Cascade concurs in those arguments as *amicus curiae*. However, several key points deserve highlighting, most notably Division I's disregard of policy arguments that courts must consider when interpreting insurance contracts. Division I's opinion overlooks the reality of the insurance industry and the routine application of PIP coverage to bicyclists. By adopting a strict dictionary definition over the definition in the insurance code and as used in the insurance industry, Division I's opinion strips important protections from bicyclists. This Court should reverse.

(1) **Division I's Published Opinion Ignores Public Policy and the Important Protections for Bicyclists in the Insurance Code**

Division I ignores the policy behind PIP insurance and the reason the legislature chose to apply it broadly to all persons “not occupying a motor vehicle,” including bicyclists. RCW 48.22.005(11). PIP (which is substantially similar to Medical Payments or “Medpay” coverage) is a type of coverage designed to provide victims of automobile crashes relatively simple access to medical benefits for their injuries as well as wage loss benefits, irrespective of fault and without having to bring a lawsuit. David K. DeWolf and Matthew C. Albrecht, *Purpose of personal injury protection statutes*, 35 Wa. Prac., WASHINGTON INSURANCE LAW AND LITIGATION § 5:1 (2018-2019 ed.).

These benefits can often be fairly low, sometimes just \$5,000, as in McLaughlin’s case, but PIP provides an important source of funds for the average purchaser of insurance, especially for those who may not be able to afford co-pays or deductibles on their health insurance plans or who need benefits for income lost due to their injuries. This coverage is important not only for people like many of Cascade’s members who depend on their bicycles for transportation, including commuting to work, but it is also crucial to the many Washingtonians who live paycheck to paycheck. After a crash, PIP coverage can often mean the difference between financial

stability and financial hardship. Importantly, PIP is designed to cover not only occupants of motor vehicles, but also the most vulnerable victims of motor vehicle crashes, such as people walking or riding a bicycle on a sidewalk, crosswalk, or a public street. RCW 48.22.005(11) (defining “pedestrian” in the PIP context as any person “not occupying a motor vehicle”).

Division I’s published opinion seems to ignore the purpose behind PIP coverage itself. PIP exists to compensate all victims of *motor vehicle* collisions because motor vehicles are inherently dangerous, especially for bicyclists and other types of pedestrians. As Division II has said, the “danger is inherent in motor vehicles because of their weight and the speed at which they travel.” *City of Montesano v. Wells*, 79 Wn. App. 529, 536, 902 P.2d 1266 (1995) (cited in petition for review at 16-18 and discussing the legal distinction between motor vehicles and other vehicles such as bicycles). Motor vehicles pose the greatest threat to other users of public streets, and bicyclists are no less vulnerable than other pedestrians to injury in motor vehicle accidents. *State v. Morris*, 87 Wn. App. 654, 666-67, 943 P.2d 329 (1997), *review denied*, 134 Wn.2d 1020 (1998) (cited in petition for review at 13).

The legislature has long recognized the special danger posed by motor vehicles. For example, the legislature has assigned significant

criminal penalties to crimes involving the criminal operation of a motor vehicle. *See, e.g.*, RCW 46.61.520 (vehicular homicide) (requiring the operation of a “motor vehicle”); RCW 46.61.524 (negligent driving in the first degree) (*accord*); RCW 46.61.525 (negligent driving in the second degree) (*accord*). And the legislature chose to become one of only a handful of states to mandate that insurers provide PIP coverage for motor vehicle collisions, unless a consumer affirmatively opts out. RCW 48.22.085. The PIP statute is just another in the long line of measures the legislature has taken to alleviate the “financial distress following in the wake of automobile accidents” and “broaden generally the public’s protection against automobile accidents.” *Kyrkos v. State Farm Mut. Auto. Ins. Co.*, 121 Wn.2d 669, 675, 852 P.2d 1078 (1993) (discussing the legislature’s reasons for expanding underinsured motorist coverage) (quotation omitted). This shows a clear policy of protecting all citizens from the dangers posed by motor vehicles.

At the same time the legislature enacted the PIP statute, it included a broad definition of “pedestrian” for PIP purposes as any person “not occupying a motor vehicle.” RCW 48.22.005(11). This clearly shows the legislature’s intent to apply PIP coverage broadly to all victims of motor vehicle collisions, whether inside a motor vehicle or not. Division I was incorrect to conclude otherwise and ignored the established public policy in

this state to protect insureds and provide benefits to those injured in motor vehicle crashes. Pet. at 3-4 (citing, *e.g.*, *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 376-77, 535 P.2d 816 (1975); *Mission Ins. Co. v. Guarantee Ins. Co.*, 37 Wn. App. 695, 699, 683 P.2d 215 (1984), etc.).

Simply put, Division I's opinion makes no sense. PIP exists to compensate all victims of motor vehicle collisions, because motor vehicle collisions are likely to cause injury. There is no reason to carve out an exception to PIP for bicyclists, where passengers of motor vehicles are covered as well as all persons "not occupying motor vehicles." Bicyclists are now the least protected class of citizens using public rights of way from an insurance perspective, which was never the intention of the legislature in choosing to enact the PIP statutes. This Court should reverse the Court of Appeals' published opinion to correct this conflict with the numerous authorities cited above and in McLaughlin's briefing, regarding PIP coverage in this state.

(2) Division I's Published Opinion Ignores the Reality of Consumers' Insurance Expectations

Division I's published opinion not only conflicts with the law and policy of this state, it ignores the reality of the insurance expectations of consumers. Bicyclists rely on PIP coverage to provide medical and other benefits for injuries in collisions with motor vehicles, irrespective of fault

and without having to file a time-consuming lawsuit. This is routine in the insurance industry as evidenced by publications from major insurers. For example, Progressive Insurance operates a “Frequently Asked Questions” page on its public website, explaining how bicyclists are often covered under their auto and homeowners’ policies. Progressive, *Bicycle Insurance*, <https://www.progressive.com/answers/bicycle-insurance/> (last visited April 10, 2020). Progressive specifically explains that for “injuries caused by biking accidents with a driver...your injuries will be covered...[i]f you have personal injury protection or medical payments coverage.” *Id.* Likewise, Esurance, a subsidiary of Allstate Insurance, explains on its website that Medpay [aka PIP] insurance covers insureds who are “struck by a car while walking or cycling.” Esurance, *Medical Payments Coverage*, <https://www.esurance.com/info/car/medical-payments-coverage> (last visited April 10, 2020).

A simple Google search reveals additional authority that demonstrates bicyclists are covered by PIP policies as pedestrians injured in motor vehicle accidents. *See, e.g.,* Myles Ma, *Is bicycle insurance a thing — & do you need it?*, Policygenius.com blog (Sept. 19, 2017) <https://www.policygenius.com/blog/does-bicycle-insurance-even-exist/> (last visited April 10, 2020) (“Every car insurance policy covers you as a cyclist for collisions involving an automobile.”); AutoInsurance.org, *Auto*

Insurance for Cyclists, <https://www.autoinsurance.org/auto-insurance-for-cyclists/> (last visited April 10, 2020) (“Cyclists will be glad to know that Medpay is applicable for bike accidents that involve a car.”).

These layperson’s authorities (*i.e.*, those that an average purchaser of insurance like Cascade’s members might find with a simple Google search) are in addition to the legal authorities from Washington cited in McLaughlin’s petition for review, where bicyclists received PIP coverage for collisions with motor vehicles *and courts referred to them as pedestrians* in such situations. Pet. at 8.² Until Division I’s published opinion, this was not a controversial understanding of the term “pedestrian” for average purchasers of PIP insurance. See CP 179-95 (several PIP policies in Washington offered by McLaughlin that define pedestrian broadly as anyone “not occupying a motor vehicle.”).

Division I wrongfully ignored this reality. McLaughlin correctly points out that an average insurance customer would consider a bicyclist to be a person “not occupying a motor vehicle.” That is the only sensible interpretation of that phrase; a bicycle has no motor. Division I’s opposite interpretation and unnecessary “harmonization” of multiple definitions of the term “pedestrian” is out of touch with reality and the plain language of

² Citing, *e.g.*, *Barriga Figueroa v. Prieto Mariscal*, 193 Wn.2d 404, 441 P.3d 818 (2019) (bicyclist received PIP benefits as a “pedestrian” injured in a crash with an automobile and this Court referred to the bicyclist as a pedestrian throughout its opinion).

the statute. The mere fact that the legislature chose to define “pedestrian” multiple ways shows that the legislature intended it to have different meanings in different contexts. *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166 (2009) (“Where the legislature uses certain statutory language in one statute and different language in another, a difference in legislative intent is evidenced.”). When the legislature intends terms appearing in different statutes to have the same meaning, it clearly knows how to do so. *E.g.*, RCW 7.70.140(1)(d) (“‘Medical malpractice’ has the same meaning as in RCW 48.140.010(9)”; RCW 26.50.010(4) (“‘Electronic monitoring’ has the same meaning as in RCW 9.94A.030”); RCW 48.41.030(6) (“‘Health care facility’ has the same meaning as in RCW 70.38.025”).

Average purchasers of insurance—and especially regular cyclists like Cascade’s members who are acutely aware of the danger posed by motor vehicles—can and do rely on the publications, court cases, and the insurance code as assurances that PIP coverage is available in bicycle vs. motor vehicle crashes. Division I’s decision to ignore the plain meaning of the term within the insurance industry and in Washington’s insurance code in favor of a strict dictionary definition conflicts with clear precedent for interpreting insurance policies. *See* Pet. at 3-14 (citing cases where

dictionary definitions did not supplant the insurance code or terms as they otherwise appear in the insurance context).

Division I's opinion turns the insurance industry on its head as it relates to bicyclists injured in crashes with automobiles. Reversal is necessary to protect this Court's precedent on the proper method of resolving insurance disputes and this state's preference in favor of providing coverage for insureds.

(3) Division I's Opinion Is Bad Policy

The Court should reverse because Division I's opinion runs contrary this state's public policy of encouraging bicycle use by undermining bicyclist safety. Bicycle use not only reduces traffic, but it is a means to combat climate change, an issue of particular importance to the citizens and leaders of our state. Carlton Reid, *Bicycling Could Help Save The Planet, Says IPCC Climate Report*, Forbes (Oct. 8, 2018, 12:31 PM), <https://www.forbes.com/sites/carltonreid/2018/10/08/bicycling-could-help-save-the-planet-says-ippc-climate-report/#11e2618f2795> (last visited April 10, 2020). Cities from Seattle to Spokane are adding infrastructure to encourage citizens to commute and travel by bicycle. These efforts have worked; one street in Seattle saw a 400 percent increase in bicycle traffic after the city added a protected bicycle lane. Angie Schmitt, *Ridership Jumped 400% When Seattle Protected a Bike Lane*, Streetsblog USA (Apr.

18, 2019) <https://usa.streetsblog.org/2019/04/18/ridership-jumped-400-when-seattle-built-a-protected-bike-lane/> (last visited April 10, 2020).

While public awareness and protected bike lanes can increase safety for bicyclists, crashes with motor vehicles are inevitable. PIP policies help reduce financial hardship for people who are involved in collisions with motor vehicles while riding bicycles. As a type of no-fault coverage, PIP also protects insured drivers who collide with people riding bicycles by discouraging lawsuits, and litigation certainly will be more common if Division I's opinion is allowed to stand. The Court should reverse this outlier opinion, that runs contrary to this state's public policy of encouraging safe bicycle use.

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E. CONCLUSION

This Court should reverse the published opinion below. Division I's opinion ignores important public policy and legal protections afforded to bicyclists in this state.

DATED this 13th day of April, 2020.

Respectfully submitted,



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